



## **ENVIRONMENTAL PROTECTION AGENCY**

### **FRL-9919-61-OAR**

#### **California State Nonroad Engine Pollution Control Standards; Portable Diesel-Fueled Engines Air Toxics Control Measure; Request for Confirmation that Amendments are Within the Scope of Previous Authorization; Opportunity for Public Hearing and Comment**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The California Air Resources Board (CARB) has notified the Environmental Protection Agency (EPA) that it adopted amendments to California's Portable Diesel-Fueled Engines Air Toxics Control Measure (Portable Engine ATCM) in 2007, 2009, and 2010. By letter dated September 15, 2014, CARB asked that EPA authorize these amendments pursuant to the Clean Air Act (CAA or Act). CARB requested EPA's confirmation that the amendments are within the scope of a prior authorization, or, in the alternative, that the amendments merit full authorization. This notice announces that EPA has tentatively scheduled a public hearing to consider California's request, and that EPA is now accepting written comment on the request.

**DATES:** EPA has tentatively scheduled a public hearing concerning CARB's request on January 14, 2015 at 10 a.m. ET. EPA will hold a hearing only if any party notifies EPA by December 15, 2014 to express interest in presenting the Agency with oral testimony. Parties that wish to present oral testimony at the public hearing should provide written notice to David Read at the email address noted below. If EPA receives a request for a public hearing, that hearing will be held at the William Jefferson Clinton Building (North), Room 5530 at 1200 Pennsylvania Ave, NW, Washington, DC 20460. If EPA does not receive a request for a public hearing, then EPA will not hold a hearing, and will

instead consider CARB's request based on written submissions to the docket. Any party may submit written comments until February 16, 2015.

Any person who wishes to know whether a hearing will be held may call David Read at (734) 214-4367 on or after December 17, 2014.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2014-0798, by one of the following methods:

- Online at <http://www.regulations.gov>: Follow the Online Instructions for Submitting Comments.
- Email: [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov).
- Fax: (202) 566-9744.
- Mail: Air and Radiation Docket, Docket ID No. EPA-HQ-OAR-2014-0798, U.S. Environmental Protection Agency, Mail code: 6102T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460. Please include a total of two copies.
- Hand Delivery: EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Online Instructions for Submitting Comments:* Direct your comments to Docket ID No. EPA-HQ-OAR-2014-0798. EPA's policy is that all comments we receive will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or

email. The <http://www.regulations.gov> website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through <http://www.regulations.gov>, your email address will automatically be captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

EPA will make available for public inspection materials submitted by CARB, written comments received from any interested parties, and any testimony given at the public hearing. Materials relevant to this proceeding are contained in the Air and Radiation Docket and Information Center, maintained in Docket ID No. EPA-HQ-OAR-2014-0798. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open to the public on all federal government work days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's website is

<http://www.epa.gov/oar/docket.html>. The electronic mail (email) address for the Air and Radiation Docket is: [a-and-r-Docket@epa.gov](mailto:a-and-r-Docket@epa.gov), the telephone number is (202) 566-1742, and the fax number is (202) 566-9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at <http://www.regulations.gov>. After opening the <http://www.regulations.gov> website, enter, in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information ("CBI") or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality also maintains a webpage that contains general information on its review of California waiver and authorization requests. Included on that page are links to prior waiver and authorization *Federal Register* notices. The page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

**FOR FURTHER INFORMATION CONTACT:** David Read, Attorney, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 2565 Plymouth Road, Ann Arbor, MI 48105. Telephone: (734) 214-4367. Fax: (734) 214-4212. Email: [read.david@epa.gov](mailto:read.david@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. California's Portable Engine ATCM Regulations**

California initially adopted its Portable Engine ATCM regulations on February 26, 2004 as part of a broad California program to reduce emissions of diesel particulate matter. The Portable Engine ATCM regulations applied to in-use, portable, off-road<sup>1</sup> diesel-fueled engines rated 50 brake horsepower (bhp) and greater. These engines were

---

<sup>1</sup> The federal term "nonroad" and the California term "off-road" may be used interchangeably herein.

required to be certified to certain emission standards by January 1, 2010, unless the engines were designated as low-use engines or as engines exclusively used in emergency applications. The initial Portable Engine ATCM became operative under state law on March 11, 2005<sup>2</sup> and EPA authorized the regulations on November 29, 2012.<sup>3</sup>

As authorized, the Portable Engine ATCM regulations require subject engines to meet specified emission standards, and require fleets of in-use diesel-fueled portable engines to meet fleet-average standards for diesel PM emissions that become increasingly more stringent in 2013, 2017, and 2020.

## **II. The 2007 Amendments**

CARB adopted the 2007 amendments at issue in this notice on July 31, 2007, and they became effective on September 12, 2007. The 2007 amendments were designed to extend temporary, emergency provisions CARB had adopted to address the inability of owners and operators to permit or register older engines that did not satisfy the Portable Engine ATCM certification requirement to meet the most stringent federal or California emission standards. The 2007 amendments addressed this issue by (i) granting discretion to local air districts to permit or register uncertified portable engines that were operated in California within a designated time period prior to October 1, 2006, or that were low-use engines or used exclusively in emergency applications, (ii) allowing Tier 1 and Tier 2 engines that were in operation within a designated time period prior to October 1, 2006, but did not meet the most stringent emission requirements, to be permitted or registered until December 31, 2009, and (iii) and otherwise providing additional compliance flexibility.

## **III. The 2009 Amendments**

---

<sup>2</sup> The Portable Engine ATCM is set forth at 17 CCR 93116 et seq.

<sup>3</sup> 77 FR 72846 (December 6, 2012).

In 2008, CARB adopted an In-Use Off-Road regulation<sup>4</sup> and a Truck and Bus regulation.<sup>5</sup> CARB then amended the Portable Engine ATCM to exempt certain engines (namely, secondary engines on two-engine cranes and two-engine sweepers, and on lattice boom cranes) that instead became subject to these other new regulations. CARB formally adopted the amendments to the Portable Engine ATCM on October 19, 2009 (the 2009 amendments).

#### **IV. The 2010 Amendments**

California formally approved the 2010 amendments to the Portable Engine ATCM on October 19, 2010 and January 20, 2011. The 2010 amendments became operative under state law on February 19, 2011. The 2010 amendments primarily provide additional exemptions (namely for snow removal vehicles and auxiliary engines on water well drilling rigs) and compliance flexibility for certain owners and operators of portable engines, as well as clarification or correction of perceived oversights in the law.

By letter dated September 15, 2014, CARB submitted a request to EPA pursuant to section 209(e) of the CAA for confirmation that the 2007, 2009, and 2010 amendments fall within the scope of EPA's previous authorization, or, in the alternative, that EPA grant a full authorization for those amendments.

#### **V. Clean Air Act Nonroad Engine and Vehicle Authorizations**

Section 209(e)(1) of the CAA prohibits states and local governments from adopting or attempting to enforce any standard or requirement relating to the control of emissions from new nonroad vehicles or engines. The Act also preempts states from adopting and enforcing standards and other requirements related to the control of emissions from non-new nonroad engines or vehicles. Section 209(e)(2), however,

---

<sup>4</sup> The California In-Use Off-Road regulation is set forth at 13 CCR 2449 et seq.

<sup>5</sup> The California Truck and Bus regulation is set forth at 13 CCR 2025 et seq.

requires the Administrator, after notice and opportunity for public hearing, to authorize California to adopt and enforce standards and other requirements related to the control of emissions from non-new nonroad engines or vehicles. Section 209(e)(2), however, requires the Administrator, after notice and opportunity for public hearing, to authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. However, EPA shall not grant such authorization if it finds that (1) the determination of California is arbitrary and capricious; (2) California does not need such California standards to meet compelling and extraordinary conditions; or (3) California standards and accompanying enforcement procedures are not consistent with CAA section 209.<sup>6</sup> In addition, other states with air quality attainment plans may adopt and enforce such regulations if the standards and the implementation and enforcement procedures are identical to California's standards. On July 20, 1994, EPA promulgated a rule that sets forth, among other things, regulations providing the criteria, as found in section 209(e)(2), which EPA must consider before granting any California authorization request for new nonroad engine or vehicle emission standards.<sup>7</sup> EPA revised these regulations in 1997.<sup>8</sup> As stated in the preamble to the 1994 rule, EPA has historically

---

<sup>6</sup> EPA's review of California regulations under section 209 is not a broad review of the reasonableness of the regulations or its compatibility with all other laws. Sections 209(b) and 209(e) of the Clean Air Act limit EPA's authority to deny California requests for waivers and authorizations to the three criteria listed therein. As a result, EPA has consistently refrained from denying California's requests for waivers and authorizations based on any other criteria. In instances where the U.S. Court of Appeals has reviewed EPA decisions declining to deny waiver requests based on criteria not found in section 209(b), the Court has upheld and agreed with EPA's determination. *See Motor and Equipment Manufacturers Ass'n v. Nichols*, 142 F.3d 449, 462–63, 466–67 (D.C. Cir. 1998), *Motor and Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095, 1111, 1114–20 (D.C. Cir. 1979). *See also* 78 FR 58090, 58120 (September 20, 2013).

<sup>7</sup> 59 FR 36969 (July 20, 1994).

<sup>8</sup> 62 FR 67733 (December 30, 1997). The applicable regulations, now in 40 CFR part 1074, subpart B, § 1074.105, provide:

interpreted the section 209(e)(2)(iii) “consistency” inquiry to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) (as EPA has interpreted that subsection in the context of section 209(b) motor vehicle waivers).<sup>9</sup>

In order to be consistent with section 209(a), California’s nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California’s nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation. To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same “consistency” criteria that are applied to motor vehicle waiver requests. Pursuant to section 209(b)(1)(C), the Administrator shall not grant California a motor vehicle waiver if she finds that California “standards and accompanying enforcement procedures are not consistent with section 202(a)” of the Act. Previous decisions granting waivers and authorizations have noted that state standards and enforcement procedures are inconsistent with section 202(a) if: (1) there is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of

---

(a) The Administrator will grant the authorization if California determines that its standards will be, in the aggregate, at least as protective of public health and welfare as otherwise applicable federal standards.

(b) The authorization will not be granted if the Administrator finds that any of the following are true:

(1) California’s determination is arbitrary and capricious.

(2) California does not need such standards to meet compelling and extraordinary conditions.

(3) The California standards and accompanying enforcement procedures are not consistent with section 209 of the Act.

(c) In considering any request to authorize California to adopt or enforce standards or other requirements relating to the control of emissions from new nonroad spark-ignition engines smaller than 50 horsepower, the Administrator will give appropriate consideration to safety factors (including the potential increased risk of burn or fire) associated with compliance with the California standard.

<sup>9</sup> 59 FR 36969 (July 20, 1994).



compliance within that time, or (2) the federal and state testing procedures impose inconsistent certification requirements.<sup>10</sup>

If California amends regulations that EPA has already authorized, California can seek EPA confirmation that the amendments are within the scope of the previous authorization. A within-the-scope confirmation, without a full authorization review, is permissible if three conditions are met.<sup>11</sup> First, the amended regulations must not undermine California's determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 202(a) of the Act. Third, the amended regulations must not raise any "new issues" affecting EPA's prior authorizations.

## **VI. EPA's Request for Comments**

As stated above, EPA is offering the opportunity for a public hearing, and is requesting written comment on issues relevant to a within-the-scope analysis. Specifically, we request comment on whether California's 2007, 2009, or 2010 Portable Engine ATCM amendments: (1) undermine California's previous determination that its standards, in the aggregate, are at least as protective of public health and welfare as comparable federal standards; (2) affect the consistency of California's requirements with section 209 of the Act; or (3) raise any other new issues affecting EPA's previous authorization determinations.

Should any party believe that the amendments are not within the scope of the previous authorization, EPA also requests comment on whether the 2007, 2009, or 2010 Portable Engine ATCM amendments meet the criteria for a full authorization.

---

<sup>10</sup> *Id.*; see also 78 FR 58090, 58092 (September 20, 2013).

<sup>11</sup> See 78 FR 38970, 38972 (June 28, 2013).

Specifically, we request comment on: (a) whether CARB's determination that its standards, in the aggregate, are at least as protective of public health and welfare as applicable federal standards is arbitrary and capricious; (b) whether California needs such standards to meet compelling and extraordinary conditions; and (c) whether California's standards and accompanying enforcement procedures are consistent with section 209 of the Act.

## **VII. Procedures for Public Participation**

If a hearing is held, the Agency will make a verbatim record of the proceedings. Interested parties may arrange with the reporter at the hearing to obtain a copy of the transcript at their own expense. Regardless of whether a public hearing is held, EPA will keep the record open until February 16, 2015. Upon expiration of the comment period, the Administrator will render a decision on CARB's request based on the record from the public hearing, if any, all relevant written submissions, and other information that she deems pertinent. All information will be available for inspection at the EPA Air Docket No. EPA-HQ-OAR-2014-0798.

Persons with comments containing proprietary information must distinguish such information from other comments to the greatest extent possible and label it as "Confidential Business Information" ("CBI"). If a person making comments wants EPA to base its decision on a submission labeled as CBI, then a non-confidential version of the document that summarizes the key data or information should be submitted to the public docket. To ensure that proprietary information is not inadvertently placed in the public docket, submissions containing such information should be sent directly to the contact person listed above and not to the public docket. Information covered by a claim of confidentiality will be disclosed by EPA only to the extent allowed, and according to the

procedures set forth in 40 CFR Part 2. If no claim of confidentiality accompanies the submission when EPA receives it, EPA will make it available to the public without further notice to the person making comments.

Dated: November 12, 2014.

Christopher Grundler, Director  
Office of Transportation and Air Quality  
Office of Air and Radiation

[FR Doc. 2014-27645 Filed 11/20/2014 at 8:45 am; Publication Date: 11/21/2014]